instances in the application of the de facto doctrine where it has worked hardship to the claimant in good faith to which the "equitable rule" might be extended without the application being more illogical than its present use. (See article—RECOVERY OF SALARY BY DE FACTO OFFICER—10 MICH. L. REV. 178-186, 291-299, for a general discussion of the subject.) These decisions do remove the hardship from the honest claimant but they place it on the public. The state's burden of enforcing rules regarding eligibility and qualification is made much heavier by removing the officer's self-interest in the matter. At a time when the sentiment for a higher standard of fitness for public office is growing in strength, any decision of our courts which tends to create a lighter regard for the laws by which we secure this standard is much to be regretted. It is an old saying that "hard cases make bad law" and the cases mentioned furnish an apt illustration of the maxim. It is to be hoped that other courts in examining these phases will see the uncertainty and ultimate injustice that they have injected into the law of the subject and will not be tempted to follow them in order to prevent a hardship to a well-intentioned though careless claimant. G. S.

THE RIGHT TO DIVERT WATER TO NON-RIPARIAN LANDS.—Though at one time in England there may have been some doubt as to the character of a riparian owner's rights in the waters of the stream, it must be considered as definitely settled by a series of cases that the doctrine of reasonable use by all the proprietors on the stream is the rule of the common law, and that the matter of priority of use or appropriation is, under that system, immaterial, unless, of course, a question of prescriptive right is involved. *Wright* v. *Howard,* 1 Sim. & S. 190; *Mason* v. *Hill,* 3 B. & Ad. 304, 5 id. 1; *Wood* v. *Waud,* 3 Exch. 748; *Embrey* v. *Owen,* 6 Exch. 353; *Sampson* v. *Hoddinott,* 1 C. B. (N. S.) 590, *Miner* v. *Gilmour,* 12 Moore P. C. 131. The American courts have generally adopted the view of the law early expressed by Chancellor KENT, which is the view approved by the English courts above referred to. See 3 KENT, COMM. *439. The rule of law is clear, the difficulties arise in its application to particular cases in the determination of the question as to whether a certain use is reasonable or not. In the second edition of his splendid treatise on IRRIGATION AND WATER RIGHTS, Mr. KINNEY has said: "Under the common law there are three classes of uses which the riparian proprietors may or may not make of the waters of a stream flowing by their lands. These are: First, natural or primary uses for which any riparian proprietor may take the waters of the whole stream; second, artificial uses or uses which are not classified as those for natural wants; and, third, uses of the water which may not be made at all; such, for example, would be the use of water by a riparian owner upon non-riparian lands." § 486.

In the first class of uses mentioned by Mr. KINNEY in which the water is used for the so-called primary or ordinary or natural purposes, it has been said by a great many courts that it is not unreasonable to abstract water to such an extent that in the case of small streams the supply is entirely exhausted. *Miner* v. *Gilmour,* supra; *Swindon Water Works Co.* v. *Wilts &*

Berks Canal Navigation Co., L. R. 7 H. L. 697; *Wadsworth* v. *Tillotson*, 15 Conn. 366, 39 Am. Dec. 391; *Arnold* v. *Foot*, 12 Wend. 330; *Evans* v. *Merriweather*, 3 Scam. 492, 38 Am. Dec. 106; *Stanford* v. *Felt*, 71 Cal. 249, 16 Pac. 900; *Willis* v. *Perry*, 92 Iowa 297, 60 N. W. 727, 26 L. R. A. 124; *Lone Tree Ditch Co.* v. *Cyclone Ditch Co.*, 26 S. D. 307, 128 N. W. 596; *Caviness* v. *La Grande Irr. Co.*, 60 Ore. 410, 119 Pac. 731. In the second class of cases the amount of water that may be wholly diverted from the stream depends upon the volume of water and the effect of the diversion upon the proprietors lower down. *Embrey* v. *Owen*, supra; *Sampson* v. *Hoddinott*, supra; *Swindon Water Works Case*, supra; *Tyler* v. *Wilkinson*, 4 Mason 397, Fed. Cas. 14, 312; *Eliot* v. *Fitchburg R. Co.*, 10 Cush. 191, 57 Am. Dec. 85. Cases to the same effect are numerous. However, it is Mr. KINNEY'S third class of cases with which this note is particularly concerned.

Is it true, as stated, that a riparian proprietor has no right to use the water upon non-riparian lands? In the leading English case, which later English cases have referred to as practically codifying the law of rights in running streams, the doctrine is laid down that the rights of riparian ownership extend only to use upon and in connection with an estate which adjoins the stream, and cannot be stretched to include uses reasonable in themselves, but upon and in connection with non-riparian estates. *Swindon Water Works Co.* v. *Wilts & Berks Canal Navigation Co.*, L. R. 7 H. L. 687. And in *McCartney* v. *Londonderry & Lough Swilly Ry.* [1904] A. C. 301, the House of Lords made a declaration that the railway company, which had been taking water by a pipe from a river where the railway right of way crossed same to a tank about one-half mile distant for use in running the company's engines, had no right to continue such diversion of water as against the lower riparian proprietor. There the amount of water diverted was so small in relation to the whole volume of water in the stream that the lower riparian proprietor's mill could have been run by the diverted water only three minutes in each day. In both cases the suggestion is made that if the diverting upper owner had said, "We do not claim a right at all, but what we propose to do is such a trivial matter that it cannot do you any practical injury," the court might have thought fit not to interfere. The Lord Chancellor, in the *McCartney* case, said, "If the question were the reasonableness in respect of quantity, I should think it a most unreasonable thing that the use of a stream passing through a very small area of riparian land should be made to extend to forty miles of country. * * * Speaking of it simply in respect of quantity, I think it more unreasonable than supplying drinking water to an asylum built on the banks, which has been held to be unlawful. But, in truth, it is not a question of the quantity at all. * * * The use which they (in this case the railway company) claim to make of it is not for the purpose of their tenements at all, but is a use which virtually amounts to a complete diversion of the stream. * * * It is a confiscation of the rights of the lower owner."

In the English courts, then, it seems clear that whatever may be the right of a riparian owner to divert water and consume it upon his riparian lands, he has no *right* to abstract water for consumption or use upon non-riparian lands, whether owned by him or not, *and regardless of the amount used.*

In this country decisions to the effect that the diversion of water beyond the watershed or for use upon non-riparian lands is unreasonable and therefore unlawful as against lower riparian owners, are not infrequent. *Bathgate* v. *Irvine,* 126 Cal. 135, 58 Pac. 442, 77 Am. St. Rep. 158; *Williams* v. *Wadsworth,* 51 Conn. 277; *Anderson* v. *R. Co.,* 86 Ky. 44, 5 S. W. 49; *Crawford Co. v. Hathaway,* 67 Neb. 325, 93 N. W. 781, 60 L. R. A. 889, 108 Am. St. Rep. 647; *McCarter* v. *Water Co.,* 70 N. J. Eq. 525, 61 Atl. 710, 70 N. J. Eq. 695, 65 Atl. 489, 14 L. R. A. (N. S.) 197, 118 Am. St. Rep. 754, 10 Ann. Cas. 116; *Garwood* v. *R. R. Co.,* 83 N. Y. 400, 38 Am. Rep. 452; *Penna. R. R. Co.* v. *Miller,* 112 Pa. St. 34, 3 Atl. 780; *Land Co.* v. *Clements,* 98 Tex. 578, 86 S. W. 733, 70 L. R. A. 964, 107 Am. St. Rep. 653. It may perhaps be said, however, that in all of these cases the facts showed that the abstracted water sensibly diminished the supply in the stream and resulted in actual present or potential damage to the lower owner. Where the amount diverted was so small as to cause no injury to the present or future use of the lower riparian land it has been held that the diversion, though for uses unconnected with the enjoyment of riparian lands, was not actionable. *Harris* v. *Ry. Co.,* 153 N. C. 542, 69 S. E. 623, 31 L. R. A. (N. S.) 543, 138 Am. St. Rep. 686; *Gillis* v. *Chase,* 67 N. H. 161, 31 Atl. 18, 68 Am. St. Rep. 645; *Lawrie* v. *Silsby,* 76 Vt. 240, 56 Atl. 1106, 104 Am. St. Rep. 927; *Eliot* v. *Fitchburg R. R. Co.,* 10 Cush. 191, 57 Am. Dec. 85.

In accord with the cases last cited is the very recent case of *Stratton* v. *Mt. Hermon Boys' School,* (Mass. 1913) 103 N. E. 87. In that case the defendant, which owned a tract of riparian land, erected thereon a pumping plant and diverted water from the stream to other lands beyond the watershed where it was used to supply the manifold needs of a large boys' school. The defendant requested the court to rule, "in effect that diversion of water to another non-riparian estate owned by it, was not conclusive evidence that the defendant was liable, but that the only question was whether it had taken an unreasonable quantity of water under all the circumstances." The court refused the request, and instructed that "the defendant's right was confined to a reasonable use of the water for the benefit of its land adjoining the water course, and of persons properly using such land, and did not extend to taking it for use upon other premises, and that if there was such use the plaintiff was entitled to recover at least nominal damages even though he had sustained no actual loss." It was held that the instruction given was erroneous, and the doctrine laid down as applicable to such cases was substantially the charge requested by defendant. "If he diverts out of the watershed or upon a disconnected estate," said RUGG, C. J., "the only question is whether there is actual injury to the lower estate for any present or future reasonable use."

The doctrine of the courts of Massachusetts, New Hampshire, Vermont and North Carolina would seem, then, to be in conflict with the rule of the English courts. What the other courts of this country, even those above referred to, would hold in a case where the water abstracted for use on non-riparian lands was so small in amount as to cause no actual or potential injury to the lower owners in the reasonable exercise of their riparian rights,

is of course problematical. It is submitted that at least in those sections of the country where the supply of water in streams is abundant the doctrine of the Massachusetts court as expressed in the *Stratton* case is preferable to the strict rule of the English courts.

In streams nature has provided tremendous possibilities for public good, and it would seem a clear dictate of common sense and a wise public policy that all possible avail should be made thereof. The common law has declared that riparian owners, in respect of their riparian lands, shall have the primary and perhaps the sole right of use of the waters. For the present purpose it may be conceded that it is wise that such persons in respect of such lands should have the primary right, but it is believed that it is not wise to give them the *exclusive* right when thereby a portion of nature's gift is squandered. If the riparian proprietor is assured his primary right of use, he is amply protected therein by his right of action against any one above, whether riparian owners in the strict sense or not, who makes such a use of the stream as to result in actual or potential injury. It may well be that proof merely of such potential injury should not be sufficient basis for a cause of action. the reason for allowing the action when there is a showing only of possible future injury is of course to prevent the acquisition of a prescriptive right. To deny to some member of the public a use of a stream, perhaps to him very beneficial, merely on the ground that some riparian proprietor lower down would be injured thereby if he were to make a use of the stream which he would be entitled to make but which as a matter of fact he is not making, thus losing to all this gift of nature, may well be said by anyone but the precedent-worshipper to be absurd. If some theory is required to prevent such use ripening into a prescriptive right, why not imply a license on the lower owner's part, so long as his rights are not actually injured, thus meeting any claim of adverse user by the upper owner? In cases such as the principal case it might be well to consider a diversion of water to non-riparian land as presumptively injurious to the lower owner, thus casting upon the abstractor the burden of proving that his diversion was, under the circumstances, lawful. R. W. A.

THE AUTHENTICATION OF REAL EVIDENCE.—To what extent the various objects constantly proffered to the courts as real evidence must be authenticated before admission and how far proponent may rely on judicial notice to supply defects in authentication, is involved in the case of *State* v. *Pierce*, 88 Atl. 740, recently decided in the Supreme Court of Vermont.

Respondent, a physician, was on trial for failure to report a case of diphtheria to the proper authorities as required by a Vermont statute. Proof that respondent knew the nature of the ailment was necessarily circumstantial, one evidentiary fact being his knowledge that X, another member of the same family; had died of the same disease about two months before. Some ten days after the death of X, her body had been exhumed and the larynx removed in the presence of the respondent. On the trial the removed organ was shown to an expert witness who was allowed to testify, over respondent's